

IN THE HIGH COURT OF SOUTH AFRICA, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

AR99/12

In the matter between:

SIZWE LUCKY NDWANDWE

Appellant

v

STATE

Respondent

JUDGMENT

Date of Hearing: 28 June 2012
Date of Judgment: 06 August 2012

D. PILLAY J

[1] This is an appeal against conviction and sentence in a rape case. The proceedings in the trial court were riddled with irregularities. The question is whether they are sufficiently serious to allow the appeal.

[2] The first irregularity is that the trial court failed to apply s 170A of the Criminal Procedure Act 51 of 1977 (CPA) which provides:

‘(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may . . . appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.’

The complainant was 17 years when she testified. Her sister, the second state witness, was 15 years when she testified. Neither the prosecutor nor the magistrate took steps to secure the evidence of the child witnesses through an intermediary.

[3] In *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others* 2009 (2) SACR 130 (CC);

2009 (4) SA 222 (CC) the Constitutional Court (CC) acknowledged that testifying in court is a daunting experience for a child victim in a sexual offence case. Testifying without the help of an intermediary exposed the children in this case to undue mental stress or suffering.

[4] Section 170A is invoked before the child is subjected to undue stress or suffering.¹ The CC outlined the procedure to be followed by all courts hearing child witnesses. The procedure involves an assessment of the child prior to testifying in court. If an intermediary is needed the state must arrange for an intermediary to be present in court. At the commencement of the trial the state must apply for the appointment of the intermediary. The CC urged that this procedure should ordinarily be followed in all matters involving child complainants in sexual offences to meet the objectives of s 170A(1) of the CPA and s 128(2) of the Constitution which promotes the best interests of the child to be of paramount importance.

‘This should become a standard preoccupation of all criminal courts dealing with child complainants in sexual offence cases. To the extent that current practice may fall short in this regard proper regard for constitutional rights of children means that in every criminal trial in which a child complainant in a sexual offence case is to testify the court must enquire into the need for the appointment of an intermediary where the state does not raise the issue. If necessary the presiding officer must initiate an enquiry into the desirability of appointing an intermediary’²

[5] The CC’s judgment, issued on 1 April 2009, should have been fresh in the minds of the learned magistrate and prosecutor in September 2009 when this trial commenced. Clearly, neither s 170A nor the CC’s judgment featured in the proceedings at all.

1 Para 93-109

2 Para 111-112

[6] The second irregularity is that the trial court failed to apply s 153(5) of the CPA which provides:

‘Where a witness at criminal proceedings before any court is under the age of eighteen years, the court may direct that no person, other than such witness and his parent or guardian or a person *in loco parentis*, shall be present at such proceedings, unless such person's presence is necessary in connection with such proceedings or is authorized by the court.’

Because a court room is generally not a place for children, sub-sec 6 further empowers a court to direct that no person under the age of 18 years shall be present at criminal proceedings unless he is a witness and is actually giving evidence in such proceedings.

[7] At the commencement of the proceedings the learned magistrate noted that the complainant was 17 years old and asked that the court be cleared of all but the accused's family, the complainant and the second child witness. The learned magistrate muddled the requirements for *in camera* proceedings. Instead of affording the child witnesses the comfort and support of their family when they testified, he aggravated their mental stress and suffering already accompanying the daunting atmosphere of a court by exposing them to not only the accused but also his family to the exclusion of their own.

[8] The third irregularity is that the learned magistrate failed to determine whether the witnesses were competent to testify. Section 164(1) of the CPA provides:

‘Any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth.’

[9] In *S v B*³ the SCA held in relation to the evidence of a complainant of 13 years in a rape case:

‘(I)n considering which powers given to the Court *a quo* in terms of s 52(3)(e) should have been exercised, the evidence given by the complainant was of material importance and it could not be ignored. Her evidence was inadmissible because the possibility existed that she did understand the nature and import of the oath or the affirmation, in which case she should have sworn or affirmed that she would tell the truth. In the event that she did not understand it, the admonishment she received was sufficient to make her evidence admissible. Understanding on the part of the complainant of the nature and import of the oath or the affirmation could hardly have made the evidence she gave less reliable. Accordingly, the objection to the admissibility of her evidence was of a technical nature and was caused by an error made by the magistrate. In the light of the foregoing, the Court *a quo* should have given consideration to whether it was a case where, without infringing upon the accused's right to a fair trial, the deficiency could not have been corrected and in the interests of justice should have been corrected. The correction could have occurred by the setting aside of the conviction, the hearing of further evidence, either by the Court *a quo* or by the regional court which convicted the accused. The evidence could have consisted in the confirmation by the complainant of her previous evidence after there had been compliance with the provisions of ss 162, 163 and 164 of the Criminal Procedure Act, or a repetition of such evidence and cross-examination of the complainant insofar as it was necessary to comply with the constitutional requirements of a fair hearing. In this regard it was important to keep in mind that justice did not only require that an innocent person not be incorrectly convicted but also that a person who committed a crime was properly punished.’

In so clarifying the approach to s 164 (1) the SCA pointed out that if s 164 (1) is not complied with, the prosecution can be still be salvaged provided the procedural formalities are cured.

³ 2003 (1) SACR 52 (SCA) at 56 E-G (headnote)

[10] In *S v Sikhapha*⁴ the SCA held that there was no substance in the complaint that the regional magistrate did not enquire whether the complainant and her brother understood the oath that was administered to them. The court pointed out that s 164 of the CPA permits a presiding officer to dispense with taking an oath where it appears that a child does not understand the nature and import of the oath. In such circumstances the presiding officer has merely to form an opinion as to whether the witness understood the meaning of the oath. In that case where the oath was administered to both the complainant of 14 years and her brother whose age was not apparent from the record, the SCA held:

‘There is no requirement that the trial court must formally enquire whether a witness understands the oath, nor that the presiding officer must record that fact.’⁵

[11] In that case, there was nothing at all in the evidence to suggest that the complainant or her brother was ignorant of the import of the oath.⁶ Similarly, the SCA upheld an appeal from this division in *Director of Public Prosecutions, KwaZulu-Natal v Mekka*⁷ in which it confirmed that a formal enquiry is not required, it being sufficient for the trial court to satisfy itself that the complainant understood the difference between truth and falsehood and had warned her to tell the truth.

[12] Mr Butler referred to *S v Malinga*⁸ in which the full bench of this division set aside a conviction for the rape of a girl of nine years, after finding that there must be a two stage enquiry of establishing first, whether the witness understands the nature and import of the oath and second, whether she knows what it means to speak the truth.⁹ Counsel

⁴ 2006 (2) SACR 439 (SCA) at para 13

⁵ *S v Chalale* 2004 (2) SACR 264 (W) at para 3

⁶ at para 14 page 445 A

⁷ 2003 (2) SACR 1 (SCA) para 12 - 15

⁸ 2002 (1) SACR 615 (N)

⁹ page 617 D-F

in that case conceded that no such enquiry was held. *Malinga* has been overtaken by *S v B* above.

[13] Another case Mr Butler relied on is *S v Swartz*¹⁰ in which the Cape High Court found that in the case of a witness of 7 years, it was not sufficient for the child to give a coherent and accurate account but that she should be able to distinguish between truth and falsity.¹¹ *Swartz* is distinguishable on the basis of the huge age gap between the complainant of 7 years in that case and 17 years in this case.

[14] In this case the child witnesses were sworn in without the presiding officer first ascertaining their competence to testify. Nor did he admonish them to speak the truth. A witness who is unable to distinguish between truth and falsehood is incompetent.¹² Swearing in the child witnesses is no assurance that they understand the oath and their obligation to speak the truth. In particular cases a formal enquiry into a witness's ability to understand the oath or affirmation though desirable,¹³ is dispensable.¹⁴ This is not such a case. In this case credibility was tenuously balanced between single witnesses on each side. Consequently, compliance with the procedural hoops that check for veracity was vital for determining credibility.

[15] The fourth irregularity is that the trial court failed to comply with s 63 of the Child Justice Act 75 of 2009 (CJA) which provides:

‘(4) A child justice court must, during the proceedings, ensure that the best interests of the child are upheld, and to this end-

(b) must, during all stages of the trial, especially during cross-

10 2009 (1) SACR 452 (C)

11 Para 7

12 *S v V* 1998 (2) SACR 651 (C); *Henderson v S* 1997 (1) ALL SA 594 (C); *S v N* [1996 \(2\) SACR 225 \(C\)](#)

13 Du Toit, Criminal Procedure Act, s 164 22-20

14 *S v Kondile* 2003 (2) SACR 221 (CK)

examination of a child, ensure that the proceedings are fair and not unduly hostile and are appropriate to the age and understanding of the child.

- (5) No person may be present at any sitting of a child justice court, unless his or her presence is necessary in connection with the proceedings of the child justice court or the presiding officer has granted him or her permission to be present.'

A child justice court is defined as:

'any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child'¹⁵

Although this definition does not cater specifically for child witnesses but child accused, there is no good reason why child witnesses should not similarly be afforded the protection of s 63 above of the CJA.

[16] The fifth irregularity is the manner in which the complainant was cross-examined. Defence counsel had to be cautioned on at least two occasions that his questioning was unfair. He continued to ask long, rambling, multiple questions which even the interpreter sometimes had difficulty in understanding.

[17] Furthermore, the proceedings were conducted by an all-male team of magistrate, prosecutor and defence attorney. It is not clear from the record whether the interpreter was also a male. If he was, this would have aggravated the child witnesses' ability in communicating effectively. Rape victims, adults and children alike have great difficulty in expressing their experiences dispassionately and coherently. The role of the interpreter to communicate empathetically in such cases is vital. In *S v S* 1995 (1) SACR 50 (ZS) the Zimbabwe court's criticism

¹⁵ Child Justice Act 75 of 2008 definition

was that the trial court personnel were all male. This despite the fact that they knew well in advance that a female juvenile would be appearing in that court on that day as a complainant in a serious rape case. Insightfully, the court observed:

‘It surely would not have been impossible to arrange for a female prosecutor or magistrate to officiate or to have a female presence of some sort. ...But surely those responsible for physically allocating cases and courts must be aware of the embarrassment likely to be felt by a little girl when relating the detailed descriptions of the perpetration of a rape required by a court of law. Such embarrassment can only be exacerbated when the evidence must be given before an exclusively male audience because:

- (1) the discussion of intimate sexual matters in the presence of members of the opposite sex is normally taboo;
- (2) the absence of a female listener means that a female witness who has been sexually abused lacks any substantial sympathetic support. No male person can possibly understand the feelings of a female victim. It is thought probable that even very young complainants feel this almost instinctively; and
- (3) it is likely that a woman or girl who has been recently or badly abused will associate, if only subconsciously, all males with her assailant.

An all-male audience is, therefore, unlikely to encourage a complainant to give full and objective evidence.’

Although this is a Zimbabwean court decision, its observations about the behaviour and psychology of female and child victims of sexual offences have universal appeal.

[18] The sixth irregularity arose when the learned magistrate failed to invite questions arising from his questioning of the appellant and her mother. His questions elicited highly relevant answers from both these witnesses. In response to the court’s question as to what caused her to delay her arrival home at about 9:30 pm she replied:

‘I was walking slowly on the way. It was uncomfortable to walk.’

Asked whether she looked at her watch or estimated the time to be 9.30 pm she replied

‘I saw the watch. I saw on the phone.

Whose phone?

My mother's phone.' . . .

[19] The alleged rape occurred at about 4 or 5pm about 500 to 800 meters from the complainant's home. Whether the complainant was being truthful about reasons for her returning home at that time and whether indeed it was 9.30pm were critical to determining whether she had in fact been raped or whether she had consented to sexual intercourse with the appellant. Further questioning by both sides was material.

[20] As for the mother's evidence, the mother had testified in chief that there had been a wedding but not on 25 December 2008. In cross-examination she testified that she could not remember when the wedding was. The court questioned her as follows:

'On the 25th did you go anywhere? . . .

No I was at home I did not go anywhere.

Ja but that is the day on which H said they went to a wedding. . .

The 25th?

Ja then they came back. You sent them to buy the chicken. . .

Which means I don't know when was the wedding.'

[21] The complainant also testified that she saw the appellant for the first time that afternoon. In contrast, her sister said that they were with him in the morning at the wedding. This contradiction cannot be satisfactorily resolved without further questioning by both parties.

[22] The mother's evidence contradicted the evidence of the two child witnesses. The failure to invite questions arising from questions the court posed, in particular, the questions cited above, are material irregularities contaminating the entire proceedings.

[23] Finally, the trial court failed to comply with s 28(2) of the Constitution. By vitiating the proceedings with the litany of irregularities above the trial court failed to promote the best interests of the child witnesses as paramount. The primacy of the rights of children prevails irrespective of whether the child witness is a complainant or an accused. Procedural fairness applies as much to the child complainants as witnesses as it does to the child accused to ensure justice.

[24] Turning to the facts, the complainant had testified that she and her younger sister were sent to buy chicken from a home about 3 or 4 kilometres away from their own home. They saw the appellant at the premises where the chicken was sold. He tried to prevent the complainant from entering the shop. She protested. He allowed her to buy the chicken. As she and her sister started walking back home the appellant joined them. Her sister walked ahead. The appellant continued to propose love to the complainant. She protested and resisted his advances. He pulled her hand. After a while her sister relieved her of carrying the chicken and headed home alone. The appellant forced the complainant under threat of a knife into a bush where he raped her twice. The appellant's defence was that he had intercourse with the complainant with her consent. He had proposed love to her in June of that year. They met occasionally at the water tap. He had arranged to meet her on the 25th of December at the station near the chicken vendor. However, he found her as she came to buy the chicken. They had seen each other at a wedding that morning.

[25] Where the truth lies between these versions I cannot divine with the proceedings being so corrosively contaminated by the procedural defects. Even if non-compliance with ss 170A and 153(5) can be waived as rights protecting the complainant and therefore not prejudicial to the appellant, and even if non-compliance with s 164(1) is a formal

procedural defect that can be remedied, the prejudice for the appellant arising from the learned magistrate's omission to invite questions arising from his questions is inescapable. Unravelling the contradictions that arose from the answers to his questions goes to the root of determining credibility.

[26] This miscarriage of justice prejudices both the complainant and the appellant. The fact that the appellant has not been found guilty or innocent leaves a cloud over the credibility of the complainant and the appellant. It will forever remain a cloud of uncertainty for both sides unless it is cleared up in some way, be it mediation, a retrial or some other process. If the complainant was truthful she will remember every Christmas as the day she lost her virginity to a rapist. If the appellant was truthful he will remember every Christmas as the day on which he was falsely charged for raping the complainant twice. If she had been raped then the fact that the appellant has not been found guilty could obstruct her recovery which, for most rape victims, is slow if not impossible.

[27] On the one hand, to refer the matter for retrial would subject her to the secondary trauma again. On the other hand, she may want to re-testify to vindicate herself. A retrial might also violate the appellant's right to a speedy trial and possibly the protection against double jeopardy. The prospects of success for a retrial are a matter within the discretion of the prosecution after consulting the complainant and her witnesses.

[28] At the hearing we agreed that the appeal should succeed and the conviction and sentence should be set aside. Without giving reasons we granted an order in those terms. I have since set out my reasons above. I propose the following further order:

1. The prosecution shall serve a copy of this judgment on the magistrate and the prosecutor who prevailed at the trial court.

D. Pillay J

MBATHA J

I agree.

It is so ordered.

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